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OBLON, SPIVAK, MCCLELLAND MAIER & NEUSTADT, P.C.			THAKUR, VIREN A	
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ALEXANDRIA, VA 22314			1794	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/583,556	Applicant(s) IWASAKI ET AL.	
	Examiner Viren Thakur	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 2 and 6-11 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1, 2 and 6-11 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>6/19/06, 8/18/06, 9/14/06</u> . | 6) <input type="checkbox"/> Other: ____ |

DETAILED ACTION

Priority

1. Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. **Claims 1-2 and 6-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

Instant claim 1 recites the limitation wherein the packaged beverage comprises "a green tea extract comprising the following ingredients A, B and C." It is unclear as to whether the percentage of the catechins used is based on the amount of the total beverage or based on the amount of the green tea extract.

Claim Rejections - 35 USC § 103

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4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

6. **Claims 1-2 and 7-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077347) in view of Tsai et al. (US 4946701).**

Regarding instant claim 1, Ohishi et al. teach a packaged beverage (Paragraph 0045) comprising green tea extract (Paragraph 0031) wherein the percentage of non polymer catechins is between 0.01 to 1.0 (Paragraph 0032). Regarding oxalic acid it is noted that Ohishi et al. teach wherein quinic acid can be added and further teaches that the quinic acid can contain oxalic acid which does not exceed the amount of quinic acid added to the beverage (Paragraph 0033). Regarding caffeine, it would have been well known to one having ordinary skill in the art that green tea extract contains caffeine. Regarding the weight ratio of oxalic acid to non polymer catechins, Ohishi et al. is silent in this

explicit teaching. Regarding the oxalic acid, Ohishi et al. teach that if the quinic acid contains oxalic acid, then the amount of oxalic acid should not exceed the content of quinic acid (Paragraph 0033). Furthermore, since the ratio of quinic acid to non-polymer catechins is between 0.01 and 0.15 when green tea extract is used (Paragraph 0031), then the ratio of oxalic acid to non-polymer catechins would also be a similar ratio. The ratio of oxalic acid to non-polymer catechins could not be higher than the ratio of quinic acid to non-polymer catechins. Therefore, the oxalic acid would have had to have been at a ratio of equal to or less than the ratio of quinic acid to non-polymer catechins. At a ratio of 0.01, Ohishi et al. would encompass the claimed ratio of between 0.0005 to 0.05. Nevertheless, the amount of quinic acid and thus the amount of oxalic acid would have been obvious for the purpose of preventing adverse aftertaste to the beverage. Therefore to ensure that the oxalic acid is at a ratio such as 0.01 in terms of the amount of non-polymer catechins would have been obvious to one having ordinary skill in the art for the purpose of preventing an adverse aftertaste to the beverage.

The claims differ from the prior art in teaching wherein the ratio of non-polymer catechins to caffeine is from 10 to 10000.

Nevertheless, similarly teach non-tea type beverages comprising a ratio of catechins to caffeine of from 1:1 to 30:1. Tsai et al. teach that teas have a stimulating effect due to the higher levels of caffeine in relation to the nonpolymerized flavanols (Column 1, Lines 25-27) but that the caffeine in teas

does not appear to be as physiologically available as in coffee (Column 1, Lines 11-13). Tsai et al. teach using caffeine at a ratio with respect to catechins at up to 1:30 and further teach that by adding caffeine the beverage can provide the physiological benefits of the catechins, such as lowering blood pressure and having other soothing and healing benefits (Column 2, Lines 17-24), while also providing the alertness and stimulatory benefit of the caffeine (See Abstract; Column 1, lines 61-64).

Based on the teachings of Tsai et al. and since the beverage of Ohishi et al. already contains caffeine, it would have been obvious to one having ordinary skill in the art to use the ratio of catechins to caffeine, as taught by Tsai et al. for the purpose of providing the known health benefits of the green tea catechins while also providing the stimulatory effect of the caffeine at levels which are naturally available in coffee. Such a modification would have provided a beverage that can provide the health benefits of the catechins while also providing the stimulatory effect desired by consumers, which occurs as a result of caffeine. By adding the caffeine at levels known in coffee, the consumer would have a wider variety of beverages by which to obtain the same stimulatory effect that would have been provided by coffee.

Regarding instant claim 8, the combined teachings of Ohishi et al. and Tsai et al. teach using the instantly claimed ratio of catechins to caffeine. Further regarding instant claim 8, Ohishi et al. teach wherein the green tea extract comprises from between 30 to 98 percent non-polymer catechins or preferably

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40 to 90 percent (Paragraph 0036), which falls within the claimed range of 20 to 90 percent.

Regarding instant claim 2, Ohishi et al. teach a sweetener, such as glucose or aspartame at between 0.05 to 0.5 percent (Paragraph 0041), which falls within the instantly claimed range.

Regarding instant claim 7, Ohishi et al. teach the pH of the beverage from 2 to 7, thus encompassing the claimed range of 2 to 6; and in an example, Ohishi et al. teach the pH of 3.2 (Paragraph 0038), thus teaching a beverage having a pH between 2 and 6 and 2 and 5.

Regarding instant claim 9, Ohishi et al. teach using PET bottles for the beverage (Paragraph 0045) and further teach that it has been known in the art to use transparent packaging, wherein said packaging is a PET bottle. Therefore, to use a transparent PET bottle would have been within the ordinarily capabilities of one skilled in the art, since Ohishi et al. teach that it was recognized in the art to use transparent PET bottles for packaging beverages and since Ohishi et al. teach a PET bottle.

Regarding instant claims 10 and 11, Ohishi et al. teach wherein the beverage can be a soft drink or a carbonated beverage or a beverage containing fruit extract (Paragraph 0039).

- 7. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ohishi et al. (US 20030077347) in view of Tsai et al. (US 4946701), as**

applied to claims 1-2 and 7-11, above, and in further view of Kuznicki et al. (US 5681569), Ekanayake et al. (US H001628 H) and Broz (US 20020197376).

Ohishi et al. and Tsai et al. are taken as applied above. Furthermore, Ohishi et al. teach sodium ions as a result of adding a salt such as sodium polyphosphate, at between 0.01 to 0.5 percent (Paragraph 0043), which is within the claimed range of 0.001 to 0.5 percent. It is noted that the endnote of table 1 on page 4 of Ohishi et al. teach that the drinking water added to the beverage contains calcium, magnesium and sodium (see *9 at the end of table 1 on page 4). Therefore, the beverage of Ohishi et al. is known to have calcium, magnesium and sodium in solution.

Nevertheless, Ohishi et al. are silent in teaching wherein the packaged beverage also contains from 0.001 to 0.2 percent of potassium ions.

It is noted that from applicants' specification that the purpose of using sodium and potassium ions which are added as a result of adding a salt is for the purpose of improving the taste of the product, based on controlling the bitterness and astringency (See Pages 3-4, Paragraph 0006 of applicants' specification). Even further, the specification further teaches on pages 11-12, paragraphs 0020 to 0023, that the sodium and potassium ions exist in fruit extract and tea extract. As such, Ohishi et al. teach a tea extract and further teach fruit extract beverages (Paragraph 0039) and using tea extract in the beverage. Therefore, this teaches the skilled artisan that there would have been a reasonable expectation that the fruit extract and tea extract of Ohishi et al. would also have contained sodium

and potassium ions, for providing a specific taste to the beverage. As discussed above, Ohishi et al. teach the claimed range of sodium ions but are silent in the potassium ions and the claimed range. Ohishi et al. also recognize that bitterness and astringency is a problem with large amounts of catechins (Paragraph 0008). Similar to applicants, Ohishi et al. teach reducing the bitterness and astringency of the beverage (See Abstract and Paragraph 0009). The inorganic salts taught by Ohishi et al., such as sodium metaphosphate and sodium polyphosphate have been well known to be used as buffers for controlling taste in beverages. Ekanayake et al. is cited as further evidence of salts that act as buffers for tea extract, which is used for beverages (Column 2, Lines 16-17 and Lines 41-44). Broz (US 20020197376) is also cited for the use of sodium and potassium salts that act as buffers to improve the taste of a beverage.

Kuznicki et al. is relied on for teaching a beverage that contains tea solids, electrolytes and carbohydrates to provide improved drinkability (Column 2, Lines 45-48) and for improved cellular hydration. Kuznicki et al. also teach that electrolytes such as sodium and potassium ions are present in fruit juices and in the tea extract, and further teach wherein the percentage of potassium ions is between 0.005 to 0.08 percent (Column 5, Lines 11-19), which is within the instantly claimed range. Kuznicki et al. also teach the combination of the potassium ion with the sodium ions, in a packaged beverage (Column 9, Lines 20-22). As recognized by the prior art, the sodium and potassium salts also act

to stabilize and buffer the beverage, thus improving the taste of the beverage, and Kuznicki et al. further teach that the sodium and potassium ions aid facilitate cellular hydration (Column 5, Lines 24-28) and are the major physiological electrolytes (Column 4, Line 66 to Column 5, Line 3). Thus including the electrolytes in a sports drink, such as that of Kuznicki et al. aids in replacing one's electrolytes after physical activity. The beverages of Kuznicki et al. and Ohishi et al. are similar in that both teach a beverage comprising catechins and fruit extract and teach improving the drinkability of the beverage. The beverage of Kuznicki et al. is drawn to a sports drink type beverage and Ohishi et al. similarly teach making packaged beverages such as sports beverages (Paragraph 0039). Therefore, it would have been obvious to one having ordinary skill in the art to apply the potassium ions, in combination with the sodium ions already employed by Ohishi et al., for the purpose of improving the taste of the beverage, since it is known in the art, as evidenced by Ekanayake et al. that salts act as buffers and control the taste associated with a beverage as a result of their ability to control the stability and quality of the food product. Since Ohishi et al. teach making sports beverages, it would further have been obvious to one having ordinary skill in the art to use the potassium and sodium salts, as taught by Kuznicki et al. for the purpose of facilitating cellular hydration, thus increasing the physiological effects of the beverage by facilitating replenishment of one's electrolytes after physical activity. Furthermore, to employ a specific amount of the potassium ions, such as that taught by Kuznicki et al. would have been

obvious to the ordinarily skilled artisan since it has been recognized in the art that such salts can control the taste and stability of the beverage, while also facilitating the cellular hydration of the nutrients of the beverage while replenishing the body's electrolytes. Therefore to use a particular amount would have been obvious for the purpose of achieving the desired taste, stability and hydration levels without drawing water out of the body, and thus would not have provided a patentable feature over the prior art, absent any clear and convincing evidence to the contrary.

Double Patenting

8. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

- 9. Claims 1-2,6-9 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1,3-5 and 8 of copending Application No. 10582873 in view of Tsai et al. (US 4946701).**

Copending claims 1, 4 and 5 teach the ratio of non-polymer catechins, oxalic acid at less than 0.06, which falls within the instantly claimed ratio of oxalic acid, a sweetener between 0.0001 to 15 percent, which falls within the limitations of instant claim 1; potassium ions from 0.001 to 0.2 percent and sodium ions from 0.001 to 0.5 percent, as recited in instant claim 6; pH from 2 to 5 as recited in instant claim 7; the green tea extract comprising from 20 to 90 percent nonpolymer catechins, as recited in instant claim 8; a clear container as recited in instant claim 9.

Copending claim 1 is silent in teaching wherein the beverage comprises caffeine present at a ratio of catechins to caffeine from 10 to 10000.

It is noted that the copending application teaches green tea extract, which has been well known by one having ordinary skill in the art to contain caffeine. Regarding the ratio of catechins to caffeine, Tsai et al. teach a ratio of up to 30:1 for the purpose of providing the known health benefits of green tea catechins, such as lowering blood pressure, while also providing the stimulatory physiological effects of caffeine at levels which are currently only present in

coffee (Column 1, Lines 11-16; Lines 61-64 and abstract). Nevertheless, Tsai et al. teach using the above ratio of catechins to caffeine for beverages such as tea and coffee but also in carbonated drinks, fruit juices and soft drinks (Column 2, Lines 29-33). Based on this teaching it would have been obvious to one having ordinary skill in the art to add the desired ratio of catechins to caffeine, as taught by Tsai et al. for the purpose of providing the desired beneficial effects of the catechins while also providing the physiological stimulatory effects of caffeine. To add these ratios into beverages such as carbonated drinks and fruit juices would have provided the consumer with a wider variety of beverages from which to obtain the same stimulatory effect that would have been provided by coffee.

This is a provisional obviousness-type double patenting rejection.

- 10. Claims 1-2 and 6-11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1,4-6, 8 and 10 of copending Application No. 10583558 in view of Tsai et al. (US 4946701).**

Copending claim 1 teaches non-polymer catechins from 0.01 to 1 percent. Copending claim 4 teaches the sodium ions at 0.001 to 0.5 percent and the potassium ions at 0.001 to 0.2 percent, as recited in instant claim 6. Copending claim 5 teaches the pH from 2 to 5, as recited in instant claim 7. Copending claim 8 teaches the ratio of oxalic acid to non-polymer catechins not greater than 0.05, which falls within the ratio as recited in instant claim 1. Copending claim 10

teaches a clear container, as recited in instant claim 9. Copending claims are silent in teaching caffeine and wherein the ratio of catechins to caffeine is from 10 to 10000.

It is noted that the copending application teaches green tea extract, which has been well known by one having ordinary skill in the art to contain caffeine. Regarding the ratio of catechins to caffeine, Tsai et al. teach a ratio of up to 30:1 for the purpose of providing the known health benefits of green tea catechins, such as lowering blood pressure, while also providing the stimulatory physiological effects of caffeine at levels which are currently only present in coffee (Column 1, Lines 11-16; Lines 61-64 and abstract). Nevertheless, Tsai et al. teach using the above ratio of catechins to caffeine for beverages such as tea and coffee but also in carbonated drinks, fruit juices and soft drinks (Column 2, Lines 29-33). Based on this teaching it would have been obvious to one having ordinary skill in the art to add the desired ratio of catechins to caffeine, as taught by Tsai et al. for the purpose of providing the desired beneficial effects of the catechins while also providing the physiological stimulatory effects of caffeine. To add these ratios into beverages such as carbonated drinks and fruit juices would have provided the consumer with a wider variety of beverages from which to obtain the same stimulatory effect that would have been provided by coffee. This is a provisional obviousness-type double patenting rejection.

- 11. Claims 1-2, 6-7 and 9 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-6, 8, 11-16, 18, 21, 25, 26 and 28 of copending Application No. 11258892**

Although the conflicting claims are not identical, they are not patentably distinct from each other because independent copending claim 11 teaches non-polymer catechins at 0.03 to 0.6 percent, which falls within the claimed range, a ratio of oxalic acid to catechins at up to 0.02, which falls within the instantly claimed range; a ratio of caffeine to catechins between 0 to 0.16, which encompasses the claimed ratio of 10 to 10000 of catechins to caffeine; sweetener at up to 15 percent, which falls within the instantly claimed range for the sweetener. Copending claim 12 further teaches sodium ions from 0.001 to 0.2 percent and potassium ions from 0.001 to 0.1, which fall within the instantly claimed range. Copending claim 13 further teaches the instantly claimed pH. Copending claim 18 teaches the clear container. Additionally, independent copending claim 1 also teaches the above limitations in combination with copending claims 2, 3 and 8. Independent copending claim 21 also teaches the above limitations in combination with copending claim 28.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

- 12. Claim 8 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-6, 8, 11-16, 18, 21, 25, 26 and 28 of copending Application No. 11258892 in view of Ohishi et al. (US 20030077374).**

The copending claims are taken as applied above but are silent in teaching wherein the green tea concentrate comprises from 20 to 90 percent non-polymers catechins based on a solid content thereof.

Ohishi et al. teach non-tea based beverages, similar to the non-tea based beverage claimed in the copending application, which comprises between 40 to 90 percent catechin content (Paragraph 0036). As a result of using at least 45 percent catechin content, the potency to achieve the desired physiological effect from the catechins is provided. Therefore it would have been obvious to one having ordinary skill in the art to use the range of catechins as taught by Ohishi et al. for the purpose of ensuring that the physiological benefits obtained as a result of using catechins is achieved. Such a modification would have increased the nutritional benefits of the packaged beverage.

This is a provisional obviousness-type double patenting rejection.

Conclusion

- 13. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.**

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carol Chaney can be reached on (571)272-1284. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Viren Thakur
Examiner
Art Unit: 1794


STEVE WEINSTEIN
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10/31/07